

# DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548

FILE:

B-212788

DATE: October 31, 1983

MATTER OF:

Blount Brothers Corporation

DIGEST:

1. The declaration of the time for bid opening by the bid opening officer is determinative of lateness absent a clear record to show that the bid opening room clock showed a time later than that designated in the solicitation.
2. Where there is conflicting evidence of  
(1) the time shown on the bid opening room clock when the bid in question arrived,  
(2) whether the bid opening officer's alternate assigned to observe the bid opening room clock actually stood in front of the clock prior to the bid opening time, and  
(3) the basis on which the bid opening officer determined that the bid opening time had arrived and that the bid in question was timely submitted, the protester fails to meet its burden of affirmatively proving its case.

Blount Brothers Corporation (Blount) protests the award of a contract under invitation for bids (IFB) No. DACA21-83-B0053 issued by the Corps of Engineers, Department of the Army (Corps), to Batteast Construction Company (Batteast) for construction of a command and control facility.

The same protest is before the United States District Court for the Southern District of Georgia, Savannah Division in Blount Brothers Corporation v. Department of the Army, et al., Civil Action No. 483-407. The court requested our decision on the protest.

We deny the protest.

027027

Bid opening for the instant IFB was scheduled for 3 p.m. on August 18, 1983. An assistant to the Corps' bid opening officer had synchronized with Coordinated Universal Military Time the minute hand, but not the second hand, of the clock to be used as the official bid opening clock. The official clock was placed on a podium facing the audience and the entrance to the room prior to 3 p.m. The bid opening officer and other Corps representatives sat at a front table on which the podium rested in a position from which they could not see the official clock unless they leaned out over the table. Shortly after an assistant to the bid opening officer designated to observe the official clock (the alternate) informed the bid opening officer that it was 15 seconds prior to 3 p.m. according to the official clock, a Batteast representative rushed to the front table and submitted Batteast's bid to the Corps. After a Corps representative had written "Batt..." on the Abstract of Bids form, the alternate informed the bid opening officer that the official clock indicated that it was 3 p.m., and the bid opening officer declared that the time for bid opening had arrived.

The bid opening officer determined, pursuant to Defense Acquisition Regulation (DAR) § 2-402.1 (1976 ed.), that Batteast's bid was timely. DAR § 2-402.1 provides as follows:

"(a) The official designated as the bid opening officer shall decide when the time set for bid opening has arrived, and shall so declare to those present ...

"(b) Performance of the procedure in (a) above may be designated to an assistant, but the bid opening officer remains fully responsible for the actions of said assistant."

The Corps subsequently awarded the contract to Batteast as the low bidder.

Blount, as the second low bidder, contends that Batteast's bid was not submitted until after the official clock indicated that it was 3 p.m. and, thus, should have been rejected.

Blount states several bases for its belief that 3 p.m. had arrived on the official clock. First, a representative of another bidder, Tyger Construction Company (Tyger), had

twice synchronized his digital watch to the second with the official clock, and he and two other Tyger representatives stated that Batteast's bid arrived 21 seconds after 3 p.m. according to the digital watch.

The Corps, on the other hand, argues that the statements of the Tyger representatives are of no significance because bidders are not permitted to rely on other clocks in attacking the bid opening officer's determination of bid opening time. See Hyster Company, 55 Comp. Gen. 267 (1975), 75-2 CPD 176; 51 Comp. Gen. 173 (1971). The Corps further claims that the alternate disregarded the second hand on the official clock in determining the time because he knew that only the minute hand and not the second hand had been synchronized with the correct time earlier that day. The alternate stated that he only watched for the minute hand to reach the vertical position indicating that it was 3 p.m. before indicating to the bid opening officer that the time for bid opening had arrived.

Second, regarding the alternate's claim that he used the minute hand and not the second hand to determine when it was 3 p.m., Blount has produced affidavits from three representatives of other bidders who were seated in the audience, in which the affiants claim that they observed the minute hand of the official clock reach the vertical position, indicating that it was 3 p.m. before Batteast's bid arrived.

The Corps contends that the statements of the representatives of other bidders should not be relied upon because time was no longer a critical concern after they submitted their bids and because they may have been distracted by the hasty entrance of Batteast's representative. The Corps further points to statements of the alternate, Batteast's representative, and a lawyer in the audience that the minute hand of the official clock had not reached the vertical position when Batteast's bid arrived.

Third, Blount disputes the claim by the bid opening officer, the alternate, another Corps representative, and two lawyers in the audience that the alternate at some time between 2:55 and 3 p.m. moved from his seat at the front table to stand within 2 feet of the official clock with his back to the audience until 3 p.m. Blount has produced affidavits from one of its own representatives and from representatives of six of the other nine bidders, all of whom were in the audience, in which the affiants state that they all had a clear, unobstructed view of the official clock until 3 p.m. Several of the affiants expressly claimed that no one stood in front of the official clock

prior to 3 p.m. Two affiants stated that they saw a Corps representative stretch across the front table a couple of times to look at the official clock. Blount argues that the affiants other than its own representative, as opposed to the Corps representatives and the two lawyers who were former employees of the Corps and were giving seminars for the Corps in the same hotel, were disinterested in whether Batteast's bid was timely. Blount contends that these affidavits make clear that the alternate did not stand in front of the official clock observing it prior to 3 p.m. and, thus, raises doubt as to whether the alternate properly determined the time.

Fourth, Blount relies on a phone conversation between one of its representatives and the bid opening officer on August 19, 1983, in which the bid opening officer said he had his alternate signal when the second hand, not the minute hand, reached 3 p.m. Blount alleges that in this conversation, the bid opening officer would not explicitly state Batteast's bid was delivered by 3 p.m., but rather would only say that Batteast's representative was in contact with a Corps representative by 3 p.m. with the intent to submit a bid. Blount further argues that the bid opening officer demonstrated bias against Blount by declaring that he was disappointed in Blount for protesting. Blount argues that on the basis of this conversation, the bid opening officer improperly determined that Batteast's bid was submitted prior to 3 p.m.

The Corps contends that the bid opening officer did not learn from his staff until after the aforementioned conversation of August 19 with the Blount representative that the alternate had relied on the minute hand and not the second hand of the official clock in determining the time. The Corps further claims that the bid opening officer emphasized during the conversation that Batteast's bid was timely received and that he was disappointed in Blount's protest because he believed that he had followed the proper procedures at the bid opening.

Fifth, Blount points to two phone conversations between two of its attorneys and a Corps representative who was seated next to the bid opening officer at the bid opening. In these conversations, the Corps representative stated that the bid opening officer had relied on his watch in determining when it was 3 p.m. and had asked an assistant how much

time his watch showed, at which point the assistant said it was 15 seconds prior to 3 p.m. The Corps representative also did not say anything about an assistant of the bid opening officer being in front of the clock. Blount argues that while the Corps representative may not have talked to the bid opening officer about whether he relied on his watch, the Corps representative's comments were based on side-by-side observation of the bid opening officer. Blount contends that these conversations reveal that the bid opening officer improperly determined when it was 3 p.m.

The Corps claims its representative had assumed that the bid opening officer relied on his watch as well as the official clock and had the aforementioned conversations before talking to the bid opening officer and his staff. The Corps also contends that the bid opening officer only consulted his watch once in order to see when the 3 p.m. deadline was approaching and that he then asked the alternate to observe the official clock and put his watch in his pocket. The Corps further points out that the alternate and another Corps representative stated that while the bid opening officer had his watch out prior to 3 p.m., the watch was not evident at 3 p.m.

Sixth, Blount brings forth the affidavit of one of its representatives, in which the affiant stated that he had synchronized the minute hand of his watch with the official clock and that while he did not look at his watch when Batteast submitted its bid, he had looked at his watch a moment before and knew that the bid was not submitted until after 3:00.

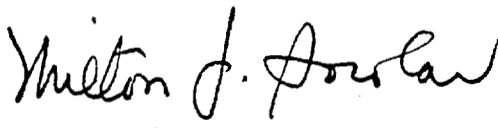
Finally, Blount points to a statement by a representative of TPI Construction Services, another bidder, that the bid opening officer opened his mouth in anticipation of closing bids when a woman to his left indicated another bid (i.e., Batteast's bid) was on the way, thus evidencing that the bid opening officer improperly allowed Batteast's bid to be submitted as timely. In rebuttal, the Corps contends that Blount declined to depose either of the two female Corps representatives seated at the front table after both stated that they made no indication to the bid opening officer that another bid was on the way.

We have repeatedly held that the declaration of time of bid opening by the bid opening officer must serve as the criterion for determining lateness absent evidence that the time the declaration was made was incorrect. Hatch Construction & Paving, B-204810, November 4, 1981, 81-2 CPD 387. Unless there is a clear record to show that the bid opening room clock showed a later time, the authorized declaration of bid opening time on the basis of the bid opening room clock must serve as the criterion for determining lateness. Eugene M. Keane, B-189184, August 8, 1977, 77-2 CPD 92; Hyster Company, *supra*. The protester has the burden of affirmatively proving its case. Parmatic Filter Corporation, B-209296, March 8, 1983, 83-1 CPD 234.

In our view, the record is not clear that the official clock showed a time later than 3 p.m. when Batteast submitted its bid. The fact that the second hand on the official clock may have shown 21 seconds after 3 p.m. is insignificant in view of the fact that the Corps did not synchronize the second hand with the correct time and, thus, determined the time on the basis of the minute hand. Blount argues that the only disinterested persons in attendance, the representatives of other bidders in the audience, stated that no Corps representative stood in front of the official clock prior to 3 p.m. and that Batteast's bid arrived after the minute hand reached the vertical position indicating 3 p.m. Blount thus implies that the statements of the bid opening officer, the alternate, other Corps representatives, and the two lawyers in the audience who were formerly employed by the Corps should not be relied upon because these persons were biased. However, in cases where bias is alleged, the protester has the burden of affirmatively proving its case and unfair or prejudicial motives will not be attributed on the basis of inference or supposition. Arctic Corner, Incorporated, B-209765, April 15, 1983, 83-1 CPD 414. Since the record fails to demonstrate that Blount's claim of bias constitutes anything more than mere speculation, we must give weight to the statements of the bid opening officer, the alternate, other Corps representatives, and the two lawyers in the audience that the alternate stood in front of the official clock prior to 3 p.m. to observe it and that Batteast's bid arrived prior to the minute hand of the official clock reaching the vertical position indicating 3 p.m. and prior to the declaration of the bid opening officer that bid opening time had arrived. Further, Blount

claims that the phone conversations involving the bid opening officer and another Corps representative demonstrate that the bid opening officer improperly determined when it was 3 p.m. However, the Corps has explained that (1) the bid opening officer did not realize until after talking on August 19 with the Blount representative that the alternate had relied on the minute hand and not the second hand of the official clock, (2) the bid opening officer emphasized during his conversation with the Blount representative that Batteast's bid was timely received and that he was disappointed in Blount's protest because he believed that he had followed the proper procedures at the bid opening, and (3) the bid opening officer had looked at his watch once prior to 3 p.m. to see when the 3 p.m. deadline was approaching before putting the watch away and relying upon the alternate to advise when 3 p.m. arrived. Finally, the record is not clear as to whether a female Corps representative interfered with the bid opening officer's declaration of bid opening time.

Accordingly, since Blount has failed to affirmatively prove that the official clock showed a time later than 3 p.m. when Batteast submitted its bid and Batteast's bid arrived before the authorized declaration of bid opening time, we deny the protest.

*for*   
Comptroller General  
of the United States